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JUN 3 1985
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84-1893

NO.

In the

Supreme Court of the United States

October Term, 1984

LA-Z-BOY CHAIR COMPANY,
Petitioner

v.

WORLD OF SLEEP, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether vertically-imposed restrictions which do not entail agreement to a specific resale price or range of prices can be deemed per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

II.

Whether resale price maintenance arrangements should continue to be judged under the per se rule.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner La-Z-Boy Chair Company ("La-Z-Boy")[1] respectfully requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on March 4, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 1467. It also appears in the Appendix hereto at 1a to 24a.[2] The District Court filed no opinions on issues raised in this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This suit involves application of Section 1 of the Sherman Act, 15 U.S.C. § 1. This provision appears at 25a.

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[1] La-Z-Boy Chair Company is a Michigan Corporation with no parent companies, subsidiaries or affiliates except wholly-owned subsidiaries.

[2] Citations to the Appendix to this petition are in the above form. Citations to the trial transcript include the volume number and page, *e.g.*, "Tr. XII, 2307." Plaintiff's trial exhibits are designated by number, while defendants' exhibits are designated by letter. No joint appendix was filed with the Court of Appeals.

STATEMENT OF THE CASE

Synopsis

In its complaint, plaintiff-respondent World of Sleep, Inc., a dealer in reclining chairs and other products, alleged that defendant La-Z-Boy, a reclining chair manufacturer, and two of its dealers, defendants Montgomery Ward & Company and Mauldin Corporation, had conspired to prevent World of Sleep from continuing to sell La-Z-Boy chairs in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. The proofs, adduced during a four-week trial generating a transcript of over 3000 pages, demonstrated that no party or non-party had agreed to a fixed resale price, and that the alleged conspiracy had no direct effect on retail prices of La-Z-Boy chairs. The district court instructed the jury that on these uncontroverted facts, La-Z-Boy's conduct was to be judged under the rule of reason, declining to give a *per se* instruction. Judgment was entered on the jury's finding of no cause for action on the § 1 claim. The Court of Appeals for the Tenth Circuit reversed and remanded for a new trial, holding that the allegations involved a vertical price-fixing conspiracy between La-Z-Boy and Mauldin but not between La-Z-Boy and Montgomery Ward, and that a *per se* instruction was required by this Court's subsequent decision in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. ____, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

World of Sleep's Advertising and Dealer Complaints

In 1974, plaintiff World of Sleep was appointed a dealer in the Denver, Colorado area for action chairs[3] manufac-

[3] Action chairs are any chair that moves and include reclining chairs, recliner-rockers, and "swivel rockers." They are manufactured by numerous companies and compete with all stationary, interior seating furniture for the retail consumer's patronage (Tr. X, 1512-22). La-Z-Boy was and is faced with numerous competitive lines of action chairs and World of Sleep and Montgomery Ward were faced with numerous competitive retailers in the Denver area (Tr. VI, 892-99; Tr. VII, 1032-33; Tr. X, 1515-25; Tr. XIV, 2409-10).

tured by defendant La-Z-Boy Chair Company (Tr. II, 98; III, 252, 265). La-Z-Boy had a policy of selling to several furniture and department stores in every market and had more than 10,000 dealers (Tr. XVIII, 2280). There were a number of La-Z-Boy dealers in Colorado, including approximately twelve in the Denver area. Among the Denver dealers was defendant Montgomery Ward & Company (Tr. II, 98-99; Tr. IV, 554).

Throughout its tenure as a La-Z-Boy dealer, World of Sleep engaged in aggressive advertising, well known to La-Z-Boy (Tr. II, 106, 108-109, 136). In the summer of 1975, World of Sleep ran a television advertisement featuring a Montgomery Ward catalog page in the hands of a model sitting in a La-Z-Boy chair, with a message that the customer could buy the same chair from World of Sleep at a much lower price (Tr. III, 306-8). Montgomery Ward objected to the use of its name in an advertisement of this type on the ground that it was unethical, and complained about the matter to La-Z-Boy (Tr. VII, 1046-47). La-Z-Boy in turn asked World of Sleep to stop using Montgomery Ward's name in its advertising, and World of Sleep agreed to do so (Tr. III, 306-8).

No complaint was made by Montgomery Ward with respect to the prices charged by World of Sleep for La-Z-Boy chairs (Tr. V, 685-7). Montgomery Ward never objected to any of World of Sleep's price promotions, nor to its method of advertising except for the one instance in which Montgomery Ward's name was specifically used (Tr. V, 684-9). There was no impact of any kind on World of Sleep's sales of La-Z-Boy chairs. World of Sleep continued to buy from La-Z-Boy as many chairs as it wanted, and its volume of sales of La-Z-Boy chairs continued to increase throughout 1975 and 1976 until after La-Z-Boy imposed a credit hold on World of Sleep (Tr. V, 687).

In March 1976, Mauldin Corporation opened the first "La-Z-Boy Showcase Shoppe" in the Denver area, devoted

exclusively to the sale of La-Z-Boy chairs (Tr. XII, 2067). World of Sleep had learned some months earlier that a new Showcase Shoppe was contemplated for Denver, and had asked that World of Sleep be allowed to own the Showcase Shoppe. La-Z-Boy, however, did not select World of Sleep (Tr. V, 631-2).

The entry of this new competitive force into the Denver market apparently angered World of Sleep, which was at that time overstocked with chairs and short on cash (Tr. V, 630; Tr. X, 1563-75). World of Sleep then began running a series of newspaper advertisements declaring a "price war" on La-Z-Boys (Tr. III, 300). There was no evidence of any objection by Montgomery Ward or Mauldin to this advertising, which featured substantial price reductions. Nor did Montgomery Ward object to the entry of the Showcase Shoppe into the Denver market (Tr. V, 692). Montgomery Ward's only involvement came when, in May 1976, World of Sleep again resorted to comparative advertising using a Montgomery Ward catalog page, prompting it again to raise the issue of the ethics of this type of advertising (Tr. VI, 912-13).

The testimony at trial established that a copy of this comparative ad in a Denver newspaper was sent from Montgomery Ward's district office in Denver to Montgomery Ward's home office in Chicago, with a note saying, "Look what's happening in Denver" (Tr. VII, 973). The recipient of this note, Al Weissenstein, Montgomery Ward's national reclining chair buyer, telephoned Robert Rall of La-Z-Boy with a simple request that World of Sleep be asked not to run newspaper advertisements featuring Montgomery Ward's catalog (Tr. VI, 915). Weissenstein testified that in his opinion at that time, name comparison ads were unethical because they misleadingly imply to the customer, based only upon a comparison on one specific item, that one retailer's prices are in general lower than another (Tr. VI, 912-15, 917-18). Donald Hamm, Ward's merchandise rebuyer in Denver, testified to the same effect (Tr. XII, 2057). It is this

complaint, made *three weeks after* the credit hold had already been imposed by La-Z-Boy (Tr. III, 309-10), which World of Sleep claims establishes a conspiracy between La-Z-Boy, Montgomery Ward and Mauldin to exclude World of Sleep. There was no evidence of *any* relevant contact between the defendants after June 1976, and there is no evidence that Montgomery Ward's complaint had anything to do with price.

The only mention of price by any witness (other than the self-serving speculation of World of Sleep's president, Thomas Hansen) was by Robert Rall, a former La-Z-Boy sales representative. In two telephone conversations surreptitiously recorded by Hansen on June 16 and 23, 1976, Rall stated he was trying to dissuade Mauldin from engaging in ruinous competition with World of Sleep. In the June 16 conversation, after telling Hansen that Montgomery Ward had complained about the comparative advertisements, Rall stated:

> We're all very concerned about pricing at any time — you know, and I knew, of course, I was going to hear from Montgomery Ward, but I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up, which is illegal to even talk to him about, but I — I knew that if it carried on out there that we were all going to be in trouble, and him more than anybody else . . . because he has to rely upon La-Z-Boys to keep in business, but I'd kind of like to — I'd like to get it stopped. I don't want the same situation that we had in Phoenix, which was bad — I mean — you know — that was — there wasn't anything good about it. Schroeder was out there for four days trying to get it resolved, and seems pretty well to have everybody — you know — talking about making some money again, and then he was — where was he? — he was in Los Angeles, and Bob Reau [La-Z-Boy's Colorado sales representative] called me and I called him about this ad, and he about shit, so — but at any rate, I told him I was going to call

> Art first and then call you, and I just — you know — I'd like to know your feeling on it. I'd like to know — what it needs — what needs to be done, Tom, to stop a price war — what you want from us or what you expect from us . . . — or what you want done there in the area.
>
> * * *
>
> We don't want any big price wars, and I'm going to do everything I can to get it stopped. If it has to come down to being drastic about it with somebody, why, we will, but we — you know — we're the kind of people that like to keep everything as smooth as possible and keep the waters calm. That's the way we all do business, but I don't want to see your business hurt, and I don't want to see La-Z-Boy's business hurt either.

(Tr. III, 343-44, 350-51; Ex. 1).

On June 23, Rall called Hansen and said that he had just come from a lengthy meeting in Chicago with the Vice President of Montgomery Ward, Jim Lutz, who was incensed over the comparative advertisement naming Montgomery Ward:

> I'm in Chicago — . . . and I spent — oh, I would say — one, two, three, four — four and a half hours in the vice-president's — Mr. Lutz's office. He's the vice-president of Montgomery Ward, and he's got your ad pinned up on the wall, and he almost pinned me up on the wall, too. You surprise me. I — you know — I thought maybe we'd be able to sit down and discuss things as far as the La-Z-Boy Showcase Shop is concerned, but I had no idea that you were going to do with the Montgomery Ward situation there, so — we're very much concerned about it now, Tom. We don't really know at this moment exactly what we're going to do. I presume that you know that we have your company on a credit hold now, and — you know — we can't ship you anything. Our plan is to leave you right there until we can figure out exactly

> what's gonna happen, and we're very sorry that any of this is happening.
>
> I had no explanation for these people at Montgomery Ward — you know. I said, "I don't know." I said, "I don't know." I don't know why the man ran an ad like that — you know — using Montgomery Ward. So I don't know that you have a reason or that you want to tell me if you do have one.

(Tr. III, 362-63; Ex. 3). It is on this evidence alone that World of Sleep now contends the credit hold (or its continuation) was part of an alleged conspiracy to fix prices.

There was substantial evidence, however, that no such meeting ever occurred — evidence that reflected adversely on Rall's credibility. In fact, Rall himself admitted that there was no meeting with Lutz at which any World of Sleep advertisement was discussed (Tr. VII, 1099, 1101-02). Rall also testified that the only complaint anyone from Montgomery Ward had ever made to him was about the ethics of the name comparison advertising, on the ground that Montgomery Ward did not believe this type of advertising was "clean" (R. VII, 1102). Rall's superior at La-Z-Boy, Gary Schroeder, testified at trial that no one at Montgomery Ward ever tried to put any pressure on La-Z-Boy (Tr. VII, 1054-55).

Lutz, who testified at trial, confirmed that there was never any meeting in his office with Rall (Tr. XII, 2014). Lutz testified that no problem involving La-Z-Boy chairs was ever brought to his attention during his tenure as vice president of Montgomery Ward, and that he had never heard of World of Sleep until he received a subpoena for his deposition in this case (Tr. XII, 2011-12). Weissenstein also testified that there was no meeting of the type described by Rall in his conversation with Hansen (Tr. VI, 916-17. Indeed, World of Sleep itself admitted that Rall was a liar (World of Sleep brief to Court of Appeals at 28).

The Credit Hold

In late April and on May 12, 1976, World of Sleep was advised that it had past due balances with La-Z-Boy and that unless the amounts were paid or other arrangements made, a credit hold would be imposed (Ex. 20, A). On May 26, 1976, *prior to* World of Sleep's advertising which criticized Montgomery Ward, and for the admittedly legitimate reason that World of Sleep owed more than $45,000 past due and $139,000 in current amounts on its account, La-Z-Boy placed World of Sleep on "credit hold" (Tr. XIII, 2307; Ex. 20, 21, A). This was in accord with established company policy, of which World of Sleep was fully aware, and which La-Z-Boy consistently applied to World of Sleep and its more than 10,000 other dealers (Tr. XIII, 2281, 2306; see Exhibits I, J, K, BB, and 84). By June 18 the amount past due had climbed to $49,112.01, and by July 30, 1976, the past due amount had escalated to over $85,000 (Tr. XIII, 2314-16).

World of Sleep admitted late payments of invoices in the spring and summer of 1976, stating it was short of funds (Tr. V, 630). It had lost money for two years and had a negative working capital position in May 1976 (Ex. 112d, 112e). It was overstocked with chairs, was postponing delivery dates, and was cancelling orders placed only a few weeks earlier (Tr. X, 1563-75).

The credit hold continued until World of Sleep paid the past due amounts in August and September of 1976 (see Ex. 49, 83, 83A). Because of its past credit problems, however, World of Sleep thereafter was limited to purchasing one railroad carload of chairs at a time on credit (approximately 220 chairs, worth about $25,000), and was required to pay for each carload before another would be delivered (Tr. XIII, 2321, 2326-30). World of Sleep remained free to purchase as many chairs as it wished on cash terms (Tr. V, 655-57; Tr. XIII, 2331-32). La-Z-Boy repeatedly offered to make another, more favorable arrangement if Hansen provided a personal guarantee or if World of Sleep submitted a letter of credit or a financial statement from which a credit rating

could be determined (Ex. 6; Tr. XIV, 2542-49). World of Sleep, however, refused to comply with any of these requests and no other credit arrangement was worked out (Tr. XIV, 2436).

Despite the credit restrictions, World of Sleep continued to purchase substantial quantities of La-Z-Boy chairs until August 1977, when it voluntarily discontinued purchasing La-Z-Boy products at the same time it started selling action chairs manufactured by its own company (Tr. V, 693-93; Tr. X, 1505, 1526-27). Only in late 1979 did it claim for the first time that the credit hold was contrived to "squeeze out" World of Sleep (Tr. XVI, 2940).

While World of Sleep contends that the credit terms were manipulated by La-Z-Boy to push it out of the market, there was no evidence showing that either Mauldin or Montgomery Ward had anything to do with the credit relationship between World of Sleep and La-Z-Boy (see Tr. VIII, 1287-94), and all of the La-Z-Boy, Montgomery Ward and Mauldin witnesses denied any involvement by Montgomery Ward or Mauldin in La-Z-Boy's decision to place World of Sleep on credit hold and later to remove the credit hold subject to conditions (see, *e.g.*, Tr. XIV, 2403).

Hansen admits that no one ever told World of Sleep how or at what level to price its chairs (Tr. V, 687; Tr. VII, 1097), and never dictated World of Sleep's pricing in any way (Tr. VIII, 1297-8). It is also clear that Rall was concerned about the welfare of La-Z-Boy's business (Tr. III, 348, 350; Tr. VIII, 1149) and was not "trying to change [World of Sleep's] way of doing business" (Tr. III, 350). While it is uncontested that La-Z-Boy never sought adherence to any specific retail price or range of prices, in Hansen's "mind" he thought that Rall's "implication" was "fishing for me to agree to keep prices up . . ." (Tr. V, 710). On this slender evidence, inferred by Hansen from colorful tapes of one person whom all parties agree was a liar, does World of Sleep's claim of price-fixing conpsiracy rest. The jury quite properly rejected it.

Proceedings

On December 10, 1979, World of Sleep filed its Complaint against La-Z-Boy, Montgomery Ward, the Mauldin Corporation and various parties related to it. The complaint alleged that the defendants had engaged in a conspiracy to restrain trade in the purchase, sale and distribution of reclining chairs in the retail market in the State of Colorado, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.[4]

Prior to trial the District Court granted summary judgment to the Mauldin defendants, concluding that there was insufficient independent evidence that they had engaged in any conspiracy, and that the tapes were therefore inadmissible as to these defendants.

The case was tried to a jury for four weeks in January 1982. At the close of the proofs, the Court refused to give World of Sleep's requested instruction regarding *per se* unlawful price fixing, concluding that there was no evidence that La-Z-Boy made any attempt to set the resale prices of its chairs sold at retail by its dealers. Instead, the Court instructed the jury that World of Sleep's Sherman Act claim was to be judged under the rule of reason (Tr. XVIII, 3149-50, 3152-55).

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[4] World of Sleep also alleged that La-Z-Boy had attempted to monopolize the market for reclining chairs in the Denver area in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and that La-Z-Boy had violated Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e), by offering different cooperative advertising allowances to dealers carrying different lines of its chairs. La-Z-Boy brought a counterclaim against World of Sleep under both the Sherman Act and the Colorado Unfair Practices Act, Colo. Rev. Stat. § 6-2-105, alleging that World of Sleep had unlawfully sold La-Z-Boy products below its costs. Prior to trial, World of Sleep dismissed its § 2 monopolization claim, and La-Z-Boy withdrew its counterclaim under the Sherman Act. The jury returned a verdict of no cause for action on La-Z-Boy's counterclaim under the Colorado Unfair Practices Act, and awarded World of Sleep $40,000 on the Robinson-Patman Act claim. This award was trebled in accord with § 4 of the Clayton Act, 15 U.S.C. § 15, bringing the judgment on this claim to $120,000. The Court of Appeals affirmed the judgment on La-Z-Boy's counterclaim but reversed the judgment on World of Sleep's Robinson-Patman Act claim, ordering that claim dismissed. 22a, 756 F.2d at 1479-81. These aspects of the Court of Appeals' ruling are not at issue in the present petition.

Following deliberations, the jury returned a verdict of no cause for action on World of Sleep's Sherman Act claim. The district court entered judgment on the verdict on February 11, 1982.

On March 4, 1985, the Court of Appeals affirmed the district court's grant of summary judgment for the Mauldin defendants, 9a-11a, 756 F.2d at 1474, agreeing with the district court's reasoning. The Court of appeals also affirmed the judgment for Montgomery Ward, concluding:

> If Montgomery Ward independently set its own prices, and if La-Z-Boy unilaterally decided to terminate World of Sleep for refusing to keep its prices up, no conspiracy existed between Montgomery Ward and La-Z-Boy. The only independent evidence of a conspiracy between them is precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsato* — complaints by a dealer who competes with the price cutting plaintiff, and action in response by the manufacturer adverse to the price cutter. Under *Monsanto* this evidence does not tend to exclude the possibility that La-Z-Boy and Montgomery Ward were acting independently. World of Sleep presented no other evidence that La-Z-Boy sought and received Montgomery Ward's agreement to maintain resale prices, or that Montgomery Ward sought and received La-Z-Boy's agreement to coerce other dealers to keep their prices up.

12a-13a, 756 F.2d at 1475. This "independent evidence of Montgomery Ward's participation in the alleged conspiracy," the Court of Appeals concluded, was "insufficient . . . to permit admission of [the] co-conspirator's hearsay statements" contained in the tapes. *Id.*

As to La-Z-Boy, however, the Court of Appeals reversed and remanded for a new trial on World of Sleep's Sherman Act claim. It reasoned:

> A buyer who contends that a seller has taken action adverse to him as a means of enforcing price fixing may establish the requisite conspiracy by showing that although he refused to acquesce in the price fixing, other

> buyers agreed to the arrangement. . . . The evidence shows that Montgomery Ward complained to La-Z-Boy about World of Sleep's ads, and that La-Z-Boy thereafter tried to convince World of Sleep to stop its price war. The taped telephone conversations are evidence that La-Z-Boy, through its agent Robert Rall, sought and received Mauldin's agreement to keep his prices up. The tapes and other evidence support a reasonable inference that Rall attempted to coerce World of Sleep's president, Hansen, into agreeing to keep his prices up by using the credit hold and subsequent purchase restrictions as "a lever to force compliance." *Monsanto*, 104 S.Ct. at 1471 n.10.

13a-14a, 756 F.2d at 1475-76 (citations and footnote omitted). Under *Monsanto*, the Court of Appeals concluded, "the jury should have been instructed that such an agreement, if proven, is illegal per se." 16a, 756 F.2d at 1477.

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary to resolve two issues of paramount importance to federal antitrust law.

First, La-Z-Boy submits that the district court correctly concluded that where an alleged vertical restriction does not entail agreement on a specific resale price or range of prices it should be submitted to the jury under the rule of reason. The Court of Appeals' holding to the contrary is inconsistent with this court's decisions in *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1976), and *Monsanto*, and with the decisions of a number of other Courts of Appeal.

Second, and in the alternative, La-Z-Boy submits that this Court should hold the *per se* rule inapplicable to vertical resale price maintenance schemes — an issue raised by the Solicitor General and other *amici curiae* in *Monsanto*, but which this Court chose not to reach in that case. 104 S.Ct. at 1469 n.7.

I.

VERTICALLY IMPOSED RESTRAINTS NOT INVOLVING AGREEMENT ON A SPECIFIC RESALE PRICE OR RANGE OF PRICES SHOULD BE JUDGED UNDER THE RULE OF REASON.

While §1 of the Sherman Act outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade," this language was early held to prohibit only contracts, combinations or conspiracies which *unreasonably* restrain trade since all contracts restrain trade to some extent. *Standard Oil Co.* v. *United States*, 211 U.S. 1 (1911). Thus, the usual standard for determining whether particular concerted action violates §1 is the "rule of reason", which requires proof of an unreasonable anticompetitive impact on a defined market, and thus requires an inquiry into all of the relevant facts and circumstances:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts.

Chicago Bd. of Trade v. *United States*, 246 U.S. 231, 238 (1918).

The courts have more recently adopted a shorthand analysis holding that very limited classes of trade restraints are unreasonable *per se:*

> Such agreements because of their pernicious effect upon competition and lack of any redeeming virtue are con-

> clusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pacific Ry. Co. v. *United States*, 356 U.S. 1, 5 (1958). This *per se* classification[5] is limited to restraints which "would always or almost always tend to restrict competition and decrease output," and thus are "plainly anticompetitive" and lacking in "any redeeming virtue." *See Broadcast Music, Inc.* v. *Columbia Broadcasting Co.*, 441 U.S. 1, 19-20 (1979). *Per se* rules are to be invoked only "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA* v. *Board of Regents of University of Oklahoma*, ___ U.S. ___, 104 S.Ct. 2948, 2962, 82 L.Ed. 2d 70 (1984).[6] Thus, it is only after "considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1976). This Court has cautioned against "literalness" in the application of *per se* rules because such rules are "overly simplistic and often overbroad," *Broadcast*

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[5] Since the decision in *Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the *per se* category has been limited to (1) price-fixing, whether horizontal (imposed by concerted action of competitors), *Arizona* v. *Mariopa County Medical society*, 457 U.S. 332, 350-51 (1982) or vertical (imposed by one higher in the distribution chain, usually a product manufacturer), *Monsanto, supra*, 104 S.Ct. at 1469; (2) horizontal market divisions, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); (3) certain types of horizontal group boycotts and concerted refusals to deal, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211-14 (1957); and (4) certain tie-in sales. *Jefferson Parish Hospital* v. *Hyde*, 466 U.S. ___, 104 S.Ct. 1551, 80 L.Ed.2d 2, 11-17 (1984).

[6] Similarly, in *Broadcast Music*, this Court stated: "More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, . . . the purpose of the practice are to threaten the proper operations of our predominantly free-market economy— that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market . . . ." 441 U.S. at 19-20 (footnote omitted). Compare *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

Music, 441 U.S. at 9, and has repeatedly declined to expand the *per se* price-fixing category. See *Broadcast Music, NCAA*.

This Court in *Monsanto* recognized that the distinction between a *per se* and a rule of reason offense in distributor termintion cases is both difficult and crucial:

> This Court has drawn two important distinctions that are at the center of this and any other distributor-termination case. First, there is the basic distinction between concerted and independent action — a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 USC § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States* v. *Colgate & Co.* 250 U.S. 300, (1919); cf. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.
>
> The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been per se illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404-409 (1911). The latter are judged under the rule of reason . . . . See *Continental T.V., Inc.* v. *GTE Sylvania Inc.* 433 U.S. 36 (1977).
>
> While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In

Sylvania we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its "market impact." See, *e.g.*, *id.*, at 51. *But the economic effect of all of the conduct described above — unilateral and concerted vertical price-setting, agreements on price and nonprice restrictions — is in many, but not all, cases similar or identical.* See, *e.g.*, *Parke, Davis, supra,* at 43 . . . . *And judged from a distance, the conduct of the parties in the various situations can be indistinguishable.* For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "free-riders" do not interfere. See *Sylvania, supra,* at 55. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows.

Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to per se treatment and treble damages. On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. *If an*

> *inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in* Sylvania *and* Colgate *will be seriously eroded.*

104 S.Ct. at 1469-70 (footnote omitted; emphasis added).

Similarly, in *GTE Sylvania*, this Court stated:

> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These redeeming virtues are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.

433 U.S. at 54. This is particularly true where interbrand competition is strong:

> [W]hen interbrand competition exists . . . it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

433 U.S. at 52 n.19.

Thus, non-price restraints imposed vertically are tested under the rule of reason. The plaintiff must prove that the restraint had an overall anti-competitive effect in the relevant market in order to prevail. No such evidence exists in this record where there was strong interbrand competition (Tr. X, 1515-25; Tr. XIV, 2409-10) and the only effect World of Sleep sought to establish was intrabrand (see Tr. XVII, 2985-92).

The proofs at trial conclusively showed that the credit hold imposed on World of Sleep by La-Z-Boy was simply a business decision relating to the risks of doing business with World of Sleep. La-Z-Boy had to protect itself, as every business must, from a bad account. La-Z-Boy did not make

World of Sleep's credit position contingent upon its manner of selling chairs. The credit hold and order limit merely reflected La-Z-Boy's efforts to protect itself against a known business risk. Similarly, La-Z-Boy's efforts to deter comparative advertising containing names of competing dealers was motivated by a desire to protect its name from association with business practices believed to be unethical. Under *Monsanto* and *GTE Sylvania*, the rule of reason must apply where the supplier has merely imposed non-price restrictions designed to protect its own business interests, even if the restraints had some effect on price.

The Court of Appeals recognized that under *Monsanto*, World of Sleep could not establish a horizontal price-fixing conspiracy between Montgomery Ward and Mauldin, with La-Z-Boy as an intermediary. It held, however, that the alleged agreement between La-Z-Boy and Mauldin that Mauldin would not engage in a potentially ruinous price war with World of Sleep was *per se* unlawful, because in its view such a *vertical* agreement is a *per se* violation if it has "the *effect of raising*, depressing, fixing, pegging or *stabilizing* the price of a commodity in interstate commerce." A-18, 756 F. 2d at 1477, *quoting United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (emphasis by the Court of Appeals). As the Court of Appeals acknowledged, however, *Socony-Vacuum* "involv[ed] a *horizontal* price-fixing conspiracy." A-18, 756 F.2d at 1477 (emphasis added). While this definition has been cited in cases involving vertical price restraints,[7] in such cases, the courts have always held price fixing to exist only where there is clear proof of agreement on a specific resale price or at least a specific range of prices. The essence of the authorities on the subject was distilled in *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 436-37 (1st Cir. 1974):

> Resale price maintenance is, in the absence of state fair trade legislation, a *per se* violation of the antitrust

[7] See, e.g., *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 18 (1968); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47 (1960).

> laws. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Dr. Miles Medical Co.* v. *John D. Parks & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). But before this doctrine can come into play there must be resale price maintenance. The Supreme Court cases have involved situations in which the attempt to set retail prices was clear. In *Simpson* v. *Union Oil Co.*, 377 U.S. 13; 84 S.Ct. 1051, 12 L.Ed. 98 (1964), upon which [plaintiff] relies, Union Oil had signed an agreement with the retailer containing the latter's promise to resell at the price set by Union Oil. In *Kiefer-Stewart* a refusal to sell at a fixed price was met by a concerted refusal to deal. In *Albrecht* v. *Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968) and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), the retailer was confronted with minimum or maximum prices and harassed by his supplier and others if he stepped out of line. *Taken together, these cases suggest that a case of illegal resale price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price.*

(Emphasis added). This analysis was adopted verbatim in *Aladdin Oil Co.* v. *Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979), affirming a grant of summary judgment. In describing the price-fixing claim as "fanciful," the Fifth Circuit concluded:

> Aladdin Oil has alleged that Texaco and Poweram Oil conspired to maintain resale prices. No announcement of prices has been shown. No "course of action [was] undertaken or threatened contingent on the willingness or unwillingness of [Aladdin Oil] to adopt the price." 496 F.2d at 437. There was no "meaningful event [dependent] on compliance or non-compliance." *Id.* Here Texaco refused to deal with Aladdin Oil and arranged with

> Poweram Oil to take over Service Oil. There was nothing beyond this. There was no resale price maintenance which occurs only "if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 43, 80 S.Ct. 503, 511, 4 L.Ed.2d 505 (1960).

603 F.2d at 1118.

There was no evidence that La-Z-Boy made any effort to compel adherence to announced prices or persuade any course of conduct conditioned upon World of Sleep's willingness to adopt some price. World of Sleep and its competitors set their own prices, both before and after the credit hold. This was conceded by World of Sleep's counsel at the end of trial:

> THE COURT: . . . Well, the testimony, as I recall it, is that there were suggested retail prices, and these were prices to which nobody paid any attention, nobody — there has been no testimony that anybody charged them in this case, that I can remember, isn't that right?
>
> MR. GENTRY [for the plaintiff]: Oh that's very true. We are not suggesting that there was an announced price."

(Tr. XVII, 2976).

A nearly identical claim was rejected by the Second Circuit in reversing a jury verdict in *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 945 (2d Cir. 1981):

> We have summarized the holdings of the Supreme Court cases in the following way:
>
> *[A] manufacturer or publisher may not enforce his announced resale prices by active coercion of those who purchase for resale*, such as through threats of termination for non-compliance, whether made in combination

> with others or alone. *Bowen* v. *New York News, Inc.* 522 F.2d 1242, 1254 (2d Cir. 1975), cert. denied, 425 U.S. 936 (1976) (citations omitted). The evidence here simply does not support the existence of an overall scheme to control prices and territories. *Although Lilly published a set of suggested retail prices, the record is devoid of any proof that Lilly sought to enforce these prices through active coercion or any other means. On the contrary, the evidence reveals that the majority of Lilly items* were being sold by Lilly wholesalers below the suggested retail prices, with no evidence of actual or threatened termination.

(Emphasis added). Similarly, La-Z-Boy products were advertised and sold in the Denver area at widely varying prices by numerous competitors, including World of Sleep, over an extended period of time, before and after the credit hold and comparative advertising incidents.

Another nearly identical claim was rejected in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). The district court, in a careful analysis, granted a directed verdict because:

> [Sweeney] has not introduced any evidence from which a jury could reasonably infer that [Texaco] took "affirmative action" to ensure adherence to some *particular resale price*.
>
> * * *
>
> There is absolutely no evidence that Texaco announced a *suggested retail price or price range* for Texaco gasoline or that it solicited the aid of other retailers in policing its enforcement.

478 F. Supp. at 260, 262 (emphasis added).

Yet another indistinguishable case is *Westinghouse Electric Corp.* v. *CX Processing Laboratories*, 523 F.2d 668 (9th Cir. 1975), where a directed verdict was affirmed. The evi-

dence showed communications between the plaintiff's competitors and the manufacturer in the nature of complaints about prices and actions by the manufacturer to discourage direct competition between the plaintiff and one other distributor. Nevertheless, the Court distinguished the price-fixing cases:

> In each instance the guilty manufacturer established either an *express resale price* or a method to prevent resale to either certain customers or within certain territories. Generally, these policies were imposed upon wholesalers or retailers through a well-defined enforcement scheme.

523 F.2d at 675 (emphasis added).[8]

The Department of Justice, in its Vertical Distribution guidelines released January 23, 1985, similarly reasoned:

> For many years resale price maintenance has been held to be illegal per se, and so these Guidelines do not apply to resale price maintenance. All vertical restraints, however, even those that result in substantial procompetitive benefits, may have some effect on price. Therefore, it is important to avoid characterizing a particular restraint as resale price maintenance merely because it may have an effect on price. Before characterizing a practice as a price restraint subject to per se condemnation, there must be an agreement between a supplier and its distributors as to resale prices. Thus, if a supplier adopts a bona fide distribution program embodying nonprice restraints, *the Guidelines will apply unless there is direct or circumstantial evidence (other*

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[8] Other cases similarly delineating this doctrine include *Maykuth* v. *Adolph Coors Co.*, 690 F.2d 689 (9th Cir. 1982); *Cowley* v. *Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980); *Clairol, Inc.* v. *Boston Discount Center of Berkley, Inc.*, 608 F.2d 1114 (6th Cir. 1979); *Santa Clara Valley Dist. Co.* v. *Pabst Brewing Co.*, 556 F.2d 942 (9th Cir. 1977); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1355 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

than effects on price) establishing an explicit agreement as to the specific prices at which goods or services would be resold.

Further, in accordance with *Eastern Scientific Co.* v. *Wild Heerbrugg Instruments, Inc.*, 572 F. 2d 883 (1st Cir.), cert. denied, 439 U.S. 833 (1978), if a supplier adopts a bona fide distribution program embodying both non-price and price restrictions, *the Department will analyze the entire program under the rule of reason if the nonprice restraints are plausibly designed to create efficiencies and if the price restraint is merely ancillary to the nonprice restraints.*

5 Trade Reg. Rep. (CCH) ¶50,473, at 56,191 (emphasis added).

Nothing in *Monsanto* is to the contrary. This court there found that Monsanto "on at least two occasions . . . approached price-cutting distributors and advised that *if they did not maintain the suggested retail price*, they would not receive adequate supplies of Monsanto's new corn herbicide," advised distributors in a newsletter of "the wisdom of participating in the suggested program," expressly requested Spray-Rite to "maintain prices," and "made explicit threats to terminate Spray-Rite unless it raised its prices." 104 S.Ct. at 1471-72 (emphasis added). There is a complete absence of similar evidence in the present record. It is uncontroverted that La-Z-Boy never sought adherence by World of Sleep, Mauldin or any other dealer to any suggested retail price, or even to a particular range of prices. Moreover, La-Z-Boy had ample business justification for the credit hold. In short, there is a lack of substantial "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." 104 S.Ct. at 1471.

The Court of Appeals' theory is based erroneously and totally on cases involving *horizontal* eliminations of price

rivalry by competitors. The Court of Appeals' dismissal of *Moore* and *Sweeney* as "cases concerned instead with *non-price restraints*," 16a n.8, 756 F.2d at 1477 n.8 (emphasis by the court), of course, begs the question. As noted in these cases and the others discussed above (but not mentioned by the Court of Appeals), virtually any "non-price" vertical restraint will "raise" or "stabilize" prices, since such restraints reduce competition between dealers handling the manufacturer's products and raise their costs of doing business (while in many cases enhancing interbrand competition). This was the case both as to La-Z-Boy's credit policies and as to its efforts to ensure that its products were advertised ethically. The alleged promise "extracted . . . from Mr. Mauldin" that he would not engage in a ruinous price war with World of Sleep (Tr. III, 343) similarly involved no agreement to a specific resale price or even a range of prices. Such an agreement, imposed vertically by a manufacturer to protect and enhance its own business interest, should be subject to the rule of reason.[9]

In sum, the Court of Appeals' facile analysis invites plaintiffs to attack as a *per se* antitrust violation any vertically-imposed restriction which allegedly may have a "stabiliz[ing]" effect on price. It ignores the interbrand procompetitive effects of such restrictions, and if allowed to stand will seriously undermine this Court's rationale in both *Monsanto* and *GTE Sylvania*. This conflict among the Circuit Courts of Appeal will encourage creative lawyering and foster litigation, while doing nothing to further the goals of the antitrust laws or economic efficiency.

This Court should grant the present petition and hold that vertical arrangements which involve no agreement to a specific resale price or range of prices are subject to the rule of reason.

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[9] Such behavior, standing alone, is of course lawful under *Colgate*. There was no evidence of any further agreement to terminate others who did not similarly agree, evidence found crucial in *Monsanto*.

II.
IN THE ALTERNATIVE, VERTICAL RESALE PRICE MAINTENANCE AGREEMENTS SHOULD BE JUDGED UNDER THE RULE OF REASON

This Court in both *Monsanto* and *GTE Sylvania* recognized that vertical restrictions can have significant procompetitive effects. This is no less true of price restraints than it is of non-price restraints: "[T]he economic effect . . . of unilateral and concerted vertical price-setting; agreements on price and nonprice restrictions — is in many, but not all, cases similar or identical." 104 S.Ct. at 1470. Moreover, in *Monsanto*, this Court further recognized that it can be very difficult to distinguish between price and non-price vertical restraints, a difficulty amply illustrated by the present case. Yet as long as one species of such restraints remains unlawful *per se*, it is imperative to do so. Under the present state of the law, manufacturers must plan their distribution programs under the threat of massive treble damage liability, deterring them from implementing plans deemed most effective and efficient.

Elementary economic theory teaches that in the absence of significant monopoly power, no firm has any power over price. Rather, price is determined by the aggregate *supply* of all sellers and producers of reasonably interchangeable products interacting with the aggregate *demand* of all consumers of such products.[10] This analysis has led many commentators to advocate rejection of *per se* treatment of resale price maintenance at least in the absence of proof of "substantial" market power. See, *e.g.*, Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution: *Per Se* Legality," 48 U. Chi. L. Rev. 6 (1981); R. Bork, *The Antitrust Paradox*, 280-98 (1978).

The Solicitor General, as *amicus curiae* in *Monsanto*, cogently argued that this Court should overrule *Dr. Miles*

[10] The record is totally devoid of any proof that La-Z-Boy has any power over the price of action chairs.

Medical Co. v. *John D. Park & Sons*, 220 U.S. 373 (1911), and hold resale price maintenance subject to the rule of reason. His arguments are directly applicable here:

> In *Sylvania*, this Court recognized that too broad an application of the per se rule to vertical restrictions might prohibit practices that may have significant pro-competitive effects. 433 U.S. at 51-52, 57-59. Nevertheless, the Court continued to assume a substantive competitive distinction between "non-price" and "price-related" vertical restrictions, applying rule of reason analysis to the former and conclusively presuming the latter to be unlawful. *Id.* at 51 n. 18. The court of appeals' decision reveals the difficulties inherent in attempting to categorize vertical restrictions in this manner for purposes of competitive analysis. Accordingly, the Court should grant review in this case to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason.
>
> First, as this case shows, in practice it is often difficult, if not impossible, to distinguish between "price" and "non-price" vertical restrictions because both types of restrictions can have an impact on price. . . . While non-price arrangements characteristically will have some effect on price, the court of appeals was far too quick to associate any such effect, no matter how attenuated, with a per se violation. After all, this Court recognized in *Sylvania* that a manufacturer's use of non-price vertical restrictions may well have an indirect effect on the level of intrabrand retail prices, see 433 U.S. at 54, yet the Court held that such restrictions must be judged under the rule of reason.
>
> Second, disparate treatment of non-price vertical restraints and resale price maintenance makes little sense from the standpoint of antitrust policy, because resale price maintenance in some situations can have

procompetitive or neutral effects. As Professor (now Judge) Posner has explained, resale price maintenance

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify resale price maintenance.

[Posner, *supra*, 48 U. Chi. L. Rev. at 9.] That certainly is not to say that resale price maintenance is always procompetitive on balance, or even that resale price maintenance and nonprice vertical distribution arrangements are equivalent in anticompetitive potential. But they are sufficiently similar in their basic competitive characteristics that the rationale of this court's decision in *Sylvania* — that per se rules should be applied only to practices that are clearly anticompetitive in almost every situation — compels the conclusion that resale price maintenance activities, too, should be analyzed under the rule of reason. This conclusion is further justified by the evident difficulty in practice of defining just what vertical restrictions should be categorized as resale price maintenance in the first place.

Finally, it would now be appropriate for this Court fully to reexamine the legal status of resale price maintenance. The Court has always regarded the rule of reason as the normal test of the unreasonableness of an alleged restraint; per se rules are invoked only where economic and judicial experience has shown that certain practices invariably have a "pernicious effect on competition" and lack "any redeeming [competitive] virtue." *Sylvania, supra*, 433 U.S. at 49-50; *Northern Pacific Ry* v. *United States*, 356 U.S. 1, 5 (1958). But the Court has never examined that experience with respect to resale price maintenance. Rather, more than 70 years ago the Court simply assumed, in *Dr. Miles Medical Co.*

> v. *John D. Park & Sons*, 220 U.S. 373, 404-409 (1911), that vertical price fixing is equivalent in all respects to horizontal price fixing and constitutes an unlawful restraint on alienation, and the court has continued to make that assumption. See, e.g., *Rice* v. *Norman Williams Co.*, [458 U.S. 654 (]1982); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 45 U.S. 97, 102 (1980); *Sylvania, supra*, 433 U.S. at 51 n.18. See generally Levi, "The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance," S.Ct. Rev. 250 (1960). Indeed, the received learning about resale price maintenance has been so little questioned because antitrust defendants are highly unlikely to contest a 70 year old per se classification and the Court has had no occasion to reconsider the assumptions made in *Dr. Miles*. The Court should grant review in this case to address the question of the competitive analysis to be applied to all forms of vertical restraints, "price" and "non-price" alike.

Brief of United States as Amicus Curiae in *Monsanto Co.* v. *Spray-Rite Serivce Corp.*, No. 82-914 (filed Jan. 3, 1983) at 13-18 (footnotes omitted).

This case, unlike *Monsanto*, presents the issue squarely because the District Court, after hearing all the evidence and finding no evidence of a set price or any effect on price, refused to give a *per se* instruction, while the Court of Appeals, finding evidence to support an agreement having the purpose of raising or stabilizing prices, ordered a new trial with a *per se* instruction. Such cases have been and will continue to be rare. This case well demonstrates the evils of the over-inclusive application of a literal *per se* rule, because La-Z-Boy's concerns and actions were entirely pro-competitive in effect and purpose. Similarly, this case presents none of the evils which supposedly justify the *per se* rule. There is no evidence of any cartelization of the La-Z-Boy dealers or of La-Z-Boy's competitors; indeed, the evi-

dence is all to the contrary. There is no evidence that output was restricted; rather, La-Z-Boy sought to have its dealers make enough money to stay in business and provide the ancillary services necessary for La-Z-Boy to compete effectively. The only justification found by the Court of Appeals for applying a *per se* rule in this case is that "a dealer's independent judgment is eliminated through a coerced agreement." 16a, 756 F.2d at 1477. Such a justification proves too much: all vertical restraints eliminate a dealer's independent judgment, not just price-related restraints. This court in *Monsanto* recognized the legitimacy of communication between a manufacturer and its dealers concerning prices and dealer profit levels in the marketplace. The Tenth Circuit opinion punishes La-Z-Boy for behavior amounting to no more, and will have the effect of continuing to deter legitimate pro-competitive behavior. Businessmen such as Mr. Rall should not think that mere talk about price is illegal. The difficulty which all the federal courts are having in applying the elusive and illogical distinction between price and non-price restraints demonstrates the compelling need to grant the petition in this case.

For all of these reasons, this Court should grant the present petition and reexamine the assumption that resale price maintenance is unlawful *per se*.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 3, 1985

APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WORLD OF SLEEP, INC.,
a Colorado corporation,
Plaintiff-Appellee,
Cross-Appellant

v.

LA-Z-BOY CHAIR COMPANY,
a Michigan corporation;
Defendant-Appellant,
Cross-Appellee

Nos. 82-1694
and 82-1818

MONTGOMERY WARD & CO.,
an Illinois Corporation;
ARTHUR MARK MAULDIN;
JEFF D. MAULDIN, individually
and d/b/a LA-Z-BOY SHOWCASE
SHOPPE; MAULDIN CORPORATION,
a New Mexico corporation;
Defendants-Appellees,

THOMAS E. HANSON,
Counterdefendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 79-C-1677)

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David J. Richman and Susan M. Rogers of Coghill & Goodspeed, P.C., Denver, Colorado, on the briefs for Defendants-Appellees Arthur Mauldin and Mauldin Corporation.

Before SEYMOUR, McWILLIAMS, Circuit Judges, and BROWN, District Judge*

SEYMOUR, Circuit Judge.

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*Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

In this antitrust action, plaintiff World of Sleep, Inc. alleged that defendants La-Z-Boy Chair Company, Montogomery Ward & Co., and Art Mauldin d/b/a/ La-Z-Boy Showcase Shoppe had conspired to maintain the retail price of La-Z-Boy chairs in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). The district court granted summary judgment for Mauldin, finding no admissible evidence linking him to the alleged conspiracy. After a four week trial, the jury found in favor of the remaining defendants on this claim.

World of Sleep also alleged that La-Z-Boy had discriminated in its advertising allowances in violation of section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (1982). La-Z-Boy counterclaimed against World of Sleep, alleging

that it had violated a provision of the Colorado Unfair Practices Act, Colo. Rev. Stat. § 6-2-105 (1973). The jury found in favor of World of Sleep on the Robinson-Patman claim and awarded damages of $40,000 against La-Z-Boy, which the trial court trebled pursuant to 15 U.S.C. 15(a) (1982). The jury found against La-Z-Boy on its counterclaim.

On appeal, World of Sleep contends that the trial court erred by refusing to submit the Sherman Act claim to the jury under the per se rule, and by granting summary judgment for Mauldin on that claim. World of Sleep further asserts that a new trial is required due to the prejudice resulting from the instructions taken as a whole, several evidentiary rulings, and the deliberate misconduct of opposing counsel. Montgomery Ward counters that the appeal is not timely, and that in any event the evidence is insufficient to establish a conspiracy involving it. La-Z-Boy also appeals, contending that it is entitled to a new trial on its state law counterclaim, that the court erred in submitting the Robinson-Patman claim to the jury, and that the award of attorney fees was excessive. We affirm in part and reverse in part.

I.
TIMELINESS OF THE APPEAL

As an initial matter we address Montgomery Ward's argument that the appeal in this case is not timely. World of Sleep's amended complaint asserted a request for attorneys fees along with claims for monetary and injunctive relief. The trial court entered judgment on the jury verdict on February 11, 1982, but did not address the outstanding request for attorneys fees. On March 17, 1982, the court ruled on the parties' post trial motions for new trial, and directed the parties to attempt to settle the attorneys fees claim and to brief any unsettled issues. On June 3, 1982, the court entered its order awarding attorneys fees of $64,708 against defendant La-Z-Boy. La-Z-Boy filed its notice of appeal on June 4, 1982, and World of Sleep filed on July 2, 1982. These

notices of appeal were filed within thirty days of the order awarding attorneys fees but not within thirty days of the order denying the motions for new trial.

In *Gurule v. Wilson*, 635 F.2d 782, 788 (10th Cir. 1980), a civil rights action brought under 42 U.S.C. § 1983 (1982), this court held that a judgment on the merits is not a final order for purposes of appeal if it does not address a prior request for attorneys fees made pursuant to section 1988. In *Black Gold, Ltd. v. Rockwool Industries, Inc.* 666 F.2d 1308, 1309 (10th Cir. 1981), we applied the *Gurule* rationale in an antitrust action and held that a decision on the merits which does not dispose of an outstanding request for attorneys fees is not final for purposes of appeal. Under these decisions, the notices of appeal were timely filed in the present case after the judgment on attorneys fees.

On March 2, 1982, however, shortly before the court denied the motions for new trial in the instant case, the Supreme Court ruled that a post-judgment application for attorneys fees is not a Rule 59(e) motion to alter or amend a judgment subject to the ten-day rule. *See White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982). "[A] request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action — issues to which Rule 59(e) was never intended to apply." *Id.* at 451 (footnote omitted). Subsequently in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), which was rendered after the instant appeals were filed, we expressly overruled *Gurule* and *Black Gold* in light of *White*.

Montgomery Ward argues that *White* directly overruled *Gurule*, and that under the holding in *White* the March 17 ruling was a final order from which World of Sleep and La-Z-Boy failed to take timely appeals. We recently considered and rejected this argument in *EEOC v. Gaddis*, 733 F.2d 1373, 1375-76 (10th Cir. 1984). We there held that *White* was a narrow opinion factually distinguishable from *Gurule*, and that *Gurule* was not overruled until we extended the rationale of *White* to it in *Cox*.

Montgomery Ward alternatively argues that *Cox* should be applied retroactively to preclude our review of the merits in this case. We considered a similar argument in *Gaddis*, 733 F.2d at 1376. Based on the analysis and authorities set out there, we decline to apply *Cox* retroactively to this case. The merits of the appeals are properly before us.

II.
BACKGROUND

The trial of this case consumed four weeks, and the record on appeal consists of over 3000 pages and hundreds of exhibits. Nonetheless, the pertinent background facts, although subject to some dispute, are not complicated.[1]

World of Sleep is a closely held corporation controlled and operated by Thomas Hansen. In 1965 it began the business of retailing bedding products in Denver. World of Sleep was a high-volume price discounter and advertised extensively. In April 1974, Hansen began ordering La-Z-Boy chairs for retail sale at World of Sleep. Montgomery Ward, La-Z-Boy's largest national purchaser of chairs for resale, also retailed La-Z-Boy chairs in Denver during the relevant time.

In the summer of 1975, World of Sleep ran a series of television commercials in which it mentioned its competitor Montgomery Ward by name, comparing the La-Z-Boy prices in Ward's catalogue with its own lower prices. Montgomery Ward complained to La-Z-Boy about the ads. Hansen testified that Gary Schroeder, executive vice president of sales and marketing for La-Z-Boy, told him to stop the ads. Schroeder did not remember talking to Hansen about the television ads although he did recall being told of Montgomery Ward's complaint by his right-hand man, Robert Rall.

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[1] The evidence relevant to World of Sleep's claim under the Robinson-Patman Act and to La-Z-Boy's counterclaim under the Colorado Unfair Practices Act will be set forth separately in the sections addressing those claims.

In March 1976, the Mauldin Corporation, a family business, opened a La-Z-Boy Showcase Shoppe in Littleton, Colorado. A "Showcase Shoppe" is an independently owned retail store which sells only La-Z-Boy products and is licensed by La-Z-Boy to use the La-Z-Boy trade name. In late March, Hansen began running a series of newspaper ads undercutting both Mauldin's Showcase Shoppe and Montgomery Ward in the price of La-Z-Boy chairs, specifically referring in the ads to the Showcase Shoppe and Montgomery Wards by name. The ads continued until August.

In late April and early May 1976, La-Z-Boy notified World of Sleep of amounts past due on its account and requested a current financial statement. Hansen did not provide one. He testified that as a matter of policy he never released that information and that he had not provided it to La-Z-Boy when he began buying chairs. Although Hansen did not deny that World of Sleep's account with La-Z-Boy was delinquent, he testified that it was due to a mix-up in deliveries by La-Z-Boy. On May 8, 1976, La-Z-Boy notified World of Sleep that its account was being placed on credit hold. The circumstances and motivation surrounding the imposition of the credit hold are the subject of conflicting evidence.

Hansen had telephone conversations with Robert Rall of La-Z-Boy on June 16 and June 23, 1976, concerning the newspaper ads in which Hansen compared World of Sleep's prices with those of Montgomery Ward. Hansen tape recorded those conversations and the tapes were admitted into evidence. In the June 16 tape, Rall said that Montgomeray Ward had complained to him about the ads. Rall also told Hansen,

> *"we're all very concerned about pricing at any time — you know, and I knew, of course, I was going to hear from Montgomery Ward, but I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them*

> *up,* which is illegal to even talk to him about, but I — I knew that if it carried on out there that we were all going to be in trouble, and him more than anybody else . . . because he has to rely upon La-Z-Boys to keep in business, but I'd kind of like to — I'd like to get it stopped. I don't want the same situation that we had in Phoenix, which was bad — I mean — you know — that was — there wasn't anything good about it. Schroeder was out there for four days trying to get it resolved, and seems pretty well to have everybody — you know — talking about making some money again. . . . I told him I was going to call Art first and then call you, and I just — you know — I'd like to know your feeling on it. *I'd like to know if — what it needs — what needs to be done, Tom, to stop a price war* — what you want from us or what you expect from us . . . — or what you want done there in the area."

Rec., pl. ex. 1 (emphasis added). Later in that same conversation Rall said,

> "*[w]e don't want any big price wars, and I'm going to do everything I can to get it stopped.* If it has to come down to being drastic about it with somebody, why, we will, but we — you know — we're kind of people that like to keep everything as smooth as possible and keep the waters calm. That's the way we all do business, but I don't want to see your business hurt, and I don't want to see La-Z-Boy's business hurt either."

Id. (emphasis added).

The June 23 conversation occurred following an alleged meeting between Rall and officers of Montgomery Ward. Rall indicated that Montgomery Ward was very unhappy about the ads and then stated to Hansen:

> "[W]e're very much concerned about [the Montgomery Ward situation] now, Tom. We don't really know at this

> moment exactly what we're going to do. I presume that you know that *we have your company on a credit hold now, and — you know — we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's going to happen,* and we're very sorry that any of this is happening."

Rec., pl. ex. 3 (emphasis added).

Although the occurrence and circumstances of the alleged meeting between Rall and Montgomery Ward are matters of conflicting evidence, it is undisputed that the Denver furniture merchandiser for Montgomery Ward sent a World of Sleep ad to the national Montgomery Ward chair buyer in Chicago, Al Weissenstein. Weissenstein testified that he complained about the ad to Rall, who "said he would talk to the guy [Hansen] to ask him to try to not run Ward's ads, reproduce Ward's ads, and . . . the guy said he wouldn't do it anymore." Rec., vol. XII, at 923.

Gordon Sauer, the La-Z-Boy Collection Manager during this time, testified that he initiated the decision to place World of Sleep on credit hold because of the large amounts past due. He asserted that he prepared a past due statement for World of Sleep which was given to Rall to take with him when he went to visit World of Sleep in late June 1976. World of Sleep officials testified, however, that Rall never discussed the delinquent amounts with them or attempted to reconcile the account. It was World of Sleep's position at trial that Rall had deliberately failed to get the credit situation resolved as part of the illegal conspiracy.

During the summer of 1976 World of Sleep paid up its account. Sauer testified that he considered the account ready for release from credit hold in September of that year. He further testified that under company policy, an account that had been on hold for three months or more was subject to a credit limit. Under the credit limit, World of Sleep was limited to the purchase of sixty chairs at a time. This restric-

tion was later modified so that World of Sleep could order a carload of about 200 chairs at a time, but could not order another carload until the previous one had been paid for. World of Sleep had purchased over 4000 chairs in 1975. Hansen testified that under the restriction he was unable to obtain enough chairs to pursue his high volume-heavy advertising sales method, particularly during the 1976 Christmas season. World of Sleep ultimately stopped buying La-Z-Boy chairs in August 1977.

III.
THE PRICE FIXING CLAIM

Based on the above events, World of Sleep alleged that La-Z-Boy, Montgomery Ward, and Mauldin conspired to maintain the retail price of La-Z-Boy chairs in violation of the Sherman Act, and that the credit hold was imposed in an attempt to enforce this illegal agreement. After summary judgment was granted for Mauldin on this claim, the jury found in favor of Montgomery Ward and La-Z-Boy.

A. Summary Judgment for Mauldin

The district court granted Mauldin's motion for summary judgment, concluding that there was insufficient evidence admissible against Mauldin of his participation in the alleged conspiracy. In reviewing a grant of summary judgment we must view the evidence in the light most favorable to the opposing party and resolve all doubts in favor of the existence of triable issues of fact. *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975). Although "summary procedures should be used sparingly in complex antitrust litigation," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), they "have a place in the antitrust field, as elsewhere," *The White Motor Co. v. United States*, 372 U.S. 253, 259 (1963); *see also First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968).

Following extensive discovery, the only evidence offered by World of Sleep connecting Mauldin to the alleged conspiracy was the telephone conversation between Hansen and Rall on June 26, 1976, in which Rall stated that he had asked Mauldin to keep his prices up and that Mauldin had said he would do so. World of Sleep also represented to the court that it would present at trial the results of surveys showing that Mauldin's advertising became less price oriented after this phone call and that Mauldin and World of Sleep both sold the same chair models. The court ruled that the taped statements by Rall relating his conversation with Mauldin were hearsay as to Mauldin. The court found that these statements were not admissible against Mauldin under Fed. R. Evid. 801(d)(2)(E) because the survey results would not constitute sufficient independent evidence of a conspiracy involving Mauldin. We agree.

Under Fed. R. Civ. P. 56(e), the court may consider only admissible evidence in ruling on a motion for summary judgment. "[A]cts and declarations of one co-conspirator are admissible against another if the *existence* of a conspiracy is in fact first established by independent evidence." *United States v. Andrews*, 585 F.2d 961, 964 (10th Cir. 1978).

> "[U]nder Rule 104 of the Federal Rules of Evidence, [a trial judge] must determine, prior to admission of the hearsay statement, as a factual matter, that the [party seeking admission] has shown by independent evidence that it is more likely than not that (1) the conspiracy existed; (2) the declarant and the defendant against whom the conspirator's statement is offered were members of the conspiracy; and (3) the statement was made during the course of and in furtherance of the objects of the conspiracy."

United States v. Peterson, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). The independent evidence rule "is not limited to criminal cases, but applies

to civil cases as well." *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1267 (9th Cir. 1983), *cert. dismissed*, 104 S.Ct. 385 (1983).

When the determination is made at the initial stage of the proceedings, as here, the conspiracy must be shown by substantial independent evidence. We have defined substantial independent evidence as more than a mere scintilla, and such evidence as a reasonable mind would accept as adequate to support a conclusion. *Peterson*, 611 F.2d at 1330 n.1.

Under this standard, we concur with the district court's determination that the proposed surveys did not constitute sufficient independent evidence to establish Mauldin's participation in a price fixing conspiracy, and that the hearsay statements therefore were not admissible against him. We accordingly affirm the summary judgment in favor of Mauldin.

B. Conspiracy Evidence With Respect To Montgomery Ward

Montgomery Ward contends that the trial court erred in denying its motion for directed verdict because the record contains insufficient admissible evidence of its participation in the alleged price fixing conspiracy. While this appeal was pending, the Supreme Court specifically addressed the quantum of conspiracy evidence required to raise a jury issue when a plaintiff dealer alleges that he was terminated by a manufacturer pursuant to a vertical agreement to maintain resale prices. *See Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). Although the Court in *Monsanto* was concerned with conspiracy evidence sufficient to avoid a directed verdict for a defendant manufacturer, rather than a defendant dealer-competitor such as Montgomery Ward, the analysis in *Monsanto* governs our resolution of Montgomery Ward's argument. The issue before us requires that we integrate the standards of *Monsanto* with the rule, discussed above in Part III A, that a co-conspirator's hear-

say statements are inadmissible against a defendant absent independent evidence of a conspiracy involving that defendant.

In *Monsanto* the Court held that a jury may not be permitted to infer an agreement "merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints," *id.* at 1470, because this evidence, without more, does not indicate concerted action. The Court noted that although evidence of complaints does have some probative value, "the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy," *id.* at 1471 n.8, and "that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 1471. "[E]vidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at n.9.

Here the district judge held extensive pretrial hearings to determine whether the taped telephone conversations were admissible against Montgomery Ward, and concluded that sufficient independent evidence existed of a conspiracy between La-Z-Boy and Montgomery Ward to admit the tapes under Fed. R. Evid. 801(d)(2)(E). With the benefit of *Monsanto*, we must disagree. If Montgomery Ward independently set its own prices, and if La-Z-Boy unilaterally decided to terminate World of Sleep for refusing to keep its prices up, no conspiracy existed between Montgomery Ward and La-Z-Boy. The only independent evidence of a conspiracy between them is precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto* — complaints by a dealer who competes with the price cutting plaintiff, and action in response by the manufacturer adverse to the price cutter. Under *Monsanto* this evidence does not tend to exclude the possibility that La-Z-Boy and Montgomery Ward were acting independently. World of Sleep pre-

sented no other evidence that La-Z-Boy sought and received Montgomery Ward's agreement to maintain resale prices, or that Montgomery Ward sought and received La-Z-Boy's agreement to coerce other dealers to keep their prices up.

We conclude that the record contains insufficient independent evidence of Montgomery Ward's participation in the alleged conspiracy to permit the admission of co-conspirator's hearsay statements, *see Filco*, 709 F.2d at 1267, and that the independent evidence, standing alone, was not enough to allow this issue to go to the jury. For this reason, we affirm the judgment for Montgomery Ward on the Sherman Act claim.

C. Conspiracy Evidence Against La-Z-Boy

We reach a different conclusion with respect to La-Z-Boy. A buyer who contends that a seller has taken action adverse to him as a means of enforcing price fixing may establish the requisite conspiracy by showing that although he refused to acquiesce in the price fixing, other buyers agreed to the arrangement. *See Black Gold Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 685-86 (10th Cir.), *cert. denied*, 105 S.Ct. 178 (1984); *see also Black Gold Ltd. v. Rockwool Industries, Inc.*, 732 F.2d 779 (10th Cir. 1984) (opinion on rehearing). The evidence shows that Mongomery Ward complained to La-Z-Boy about World of Sleep's ads, and that La-Z-Boy thereafter tried to convince World of Sleep to stop its price war. The taped telephone conversations are evidence that La-Z-Boy, through its agent Robert Rall, sought and received Mauldin's agreement to keep his prices up.[2] The tapes and other evidence support a

[2] Although the tapes are inadmissible as to Mauldin under the co-conspirator's hearsay rule, we agree with the district court that the tapes are admissible against La-Z-Boy under Fed. R. Evid. 801(d)(2)(I) as an admission by a party. The conclusion that the tapes were inadmissible as to Mauldin was not a conclusion that Mauldin and La-Z-Boy had not conspired, and the trial judge so stated. In an action against La-Z-Boy, therefore, La-Z-Boy can still be accused of conspiring with Mauldin. *See, e.g., United States v. Sangmeister*, 685 F.2d 1124, 1126-27 (9th Cir. 1982); *United States v. Coppola*, 526 F.2d 764, 776 (10th Cir. 1975); *cf. United States v. Hopkinson*, 631 F.2d 665, 668 (10th Cir. 1980), *cert. denied*, 450 U.S. 969 (1981).

reasonable inference that Rall attempted to coerce World of Sleep's president, Hansen, into agreeing to keep his prices up by using the credit hold and subsequent purchase restrictions as "a lever to force compliance." *Monsanto*, 104 S.Ct. at 1471 n.10. This evidence raises a fact issue as to whether a conspiracy existed involving La-Z-Boy and Mauldin, and is sufficient to send the Sherman Act claim against La-Z-Boy to the jury. *See id.* at 1471-72.

D. The Requested Per Se Instruction

The district court instructed the jury to evaluate World of Sleep's Sherman Act claim under the rule of reason. Given our conclusion that the record contains sufficient admissible evidence of a conspiracy involving La-Z-Boy to create a jury issue, we must determine whether the trial court erred in holding that the Sherman Act claim was not subject to the per se rule.

The factual, legal, and economic considerations relevant to an alleged vertical conspiracy to maintain resale prices are troublesome and have been the subject of considerable litigation and commentary. In *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 58 (1977), the Supreme Court overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and held that nonprice vertical restraints are not illegal per se but are to be judged under the rule of reason. Both before and after the *Sylvania* decision arguments have been offered in favor of abandoning the per se rule with respect to vertical price restraints as well. *See, e.g., Sylvania*, 433 U.S. at 69-70 (White, J., concurring in the judgment); *Monsanto*, 104 S.Ct. at 1469 n.7; A.B.A. Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intraband Competition 77-96 (1977). However, in *Monsanto* the Court declined to alter the rule that vertical agreements to fix prices remain illegal per se. *See* 104 S.Ct. at 1469; *see also Sylvania*, 433 U.S. at 51 n.18.

La-Z-Boy argued to the trial court that there can be no per se illegal price fixing in a vertical context without an

announced fixed resale price and adherence to that announced price. La-Z-Boy convinced the court that to be subject to the per se rule, the vertical agreement must be to maintain a specific price rather than merely to keep prices up. La-Z-Boy argues on appeal that coercion to maintain price levels, which would be illegal per se in a horizontal agreement, is not per se illegal when the conspiracy is vertical. We are not persuaded.

The Supreme Court has proscribed vertical price fixing conspiracies as illegal per se because such agreements deprive dealers of the ability to exercise their own judgment in "making independent pricing decisions." *Monsanto*, 104 S.Ct. at 1470; *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968); *see also Simpson v. Union Oil Co.*, 377 U.S. 13, 20-21 (1964); *cf. United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-47 (1960). In condemning vertical price restraints, the Court has often cited the description of price fixing set out in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940), a case involving a horizontal price fixing conspiracy. *See, e.g., Simpson*, 377 U.S. at 18; *Parke, Davis*, 362 U.S. at 47; *see also Albrecht*, 390 U.S. at 151. *Socony-Vacuum* states that "[u]nder the Sherman Act a combination formed for the purpose and with the *effect of raising*, depressing, fixing, pegging, *or stabilizing* the price of a commodity in interstate or foreign commerce is illegal per se." *Socony-Vacuum*, 310 U.S. at 223 (emphasis added).

Given the Supreme Court's adoption in vertical cases of a price fixing definition requiring only that prices be raised or stabilized, we reject La-Z-Boy's argument that a vertical conspiracy which maintains resale prices without setting a

fixed price is not illegal per se.[3] The relevant consideration is not whether a specific price is set, but whether a dealer's independent judgment is eliminated through a coerced agreement. *See id.* at 221-22; *AAA Liquors, Inc. v. Joseph E. Seagram & Sons Inc.*, 705 F.2d 1203, 1205-06 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). In this case, World of Sleep contends that La-Z-Boy successfully pressured Mauldin to agree to keep his prices above the level he would have set in response to World of Sleep's competition. There is evidence in the record that La-Z-Boy was in a position to exert pressure over Mauldin, who carried only La-Z-Boy products. We conclude that the jury should have been instructed that such an agreement, if proven, is illegal per se. Accordingly, we reverse and remand for a new trial on World of Sleep's Sherman Act claim against La-Z-Boy.

E. Lost Profits from Licensee Sales

In 1977, after the events giving rise to this lawsuit, World of Sleep entered into licensing arrangements with four stores in the Denver area. Two of the stores were controlled by World of Sleep officers, and two were independently owned although apparently closely connected to World of Sleep. World of Sleep sold merchandise to these stores at a profit, and provided them warehouse facilities and advertising. At trial, World of Sleep sought to recover as damages the lost profits it would have realized on sales of La-Z-Boy chairs to its licensee stores had it still been dealing with La-Z-Boy. The district court refused to allow these lost profits

[3] We have examined the authorities cited by La-Z-Boy to support its theory and find that they are factually distinguishable. These cases do not even address the distinction which La-Z-Boy contends is dispositive here. They are concerned instead with *nonprice* restraints, *see, e.g., Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981), or the evidence necessary to establish a coerced agreement, *see, e.g., H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 945 (2d Cir. 1981), *cert. denied* 459 U.S. 880 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-16 (3d Cir. 1980), *cert. denied* 451 U.S. 911 (1981).

as an element of damages, ruling under Fed. R. Evid. 403 that they would cause undue confusion and delay, and that they were too speculative.

Damages are awarded to an antitrust plaintiff under Section 4 of the Clayton Act, which provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 15(a). Under this Act, a plaintiff seeking to recover lost profits that he would have made if he had not been prevented from doing so by the defendant's illegal conduct must prove an antitrust violation, the fact of damage or injury, and measurable damages. *Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983). To establish the fact of injury, a plaintiff must show "a causal connection between the defendant's actions violative of the Sherman Act and the actual injury to the plaintiff's business." *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

The Supreme Court has directed us to

> "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of

> defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' "

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969) (citations omitted) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Thus, a plaintiff's burden to show injury in fact "is satisfied by its proof of *some* damage flowing from the unlawful conspiracy," *id.* at 114 n.9, which may be established by reasonable inferences drawn from circumstantial evidence, *id.* at 125.

If the plaintiff has demonstrated some damage, the actual amount need not be proven to the same degree of certainty. *King & King*, 657 F.2d at 1158. "[A] plaintiff is not to be held to a rigid standard of proof regarding the amount of damages, since in such cases economic harm is frequently intangible and difficult to quantify." *Id.* at 1157.

> "[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extend of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

The trial judge in this case concluded that World of Sleep's lost profits from potential sales to the licensee stores were too speculative because "there is no history at all of any profit or loss on these dealings during the years involved in this case . . . [and] no evidence that La-Z-Boy would have consented to such an operation." Rec., vol. XII,

at 787. The court also concluded that World of Sleep had failed to supply sufficient evidence of the expenses involved in this business to show that any profit would have been realized.

Under the standards for proof of antitrust damages set out above, we must conclude that the court's decision to exclude proof of this element of damages cannot be sustained. If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are clearly available under section 4 of the Clayton Act. *See, e.g., Zenith*, 395 U.S. at 129. Here, plaintiff proffered evidence that all four Denver licensee stores bought almost all their merchandise from World of Sleep, and that World of Sleep sold La-Z-Boy chairs to other licensee stores outside the Denver area during the existence of the alleged conspiracy.[4] World of Sleep also proffered evidence through its expert of the method by which the potential profits could be calculated. Other evidence at trial tended to prove the unique character of La-Z-Boy chairs and World of Sleep's inability to replace that brand with another equally effective seller. World of Sleep also demonstrated the value of selling a recognized name brand. This evidence is sufficient to permit a reasonable inference of injury in fact, and to afford a rational basis for inferring an approximate amount of damages. On retrial of the Sherman Act claim against La-Z-Boy, World of Sleep may thus present evidence relevant to this element of damages.[5]

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[4] We thus disagree with the district court's conclusion that World of Sleep failed to make an adequate showing that La-Z-Boy would have consented to the potential sales at issue here. We note that there is one reference in the record to La-Z-Boy's potential disapproval of transshipping, but only with respect to shipments made to dealers outside the Denver area. Any factual dispute on this issue is one for the jury to resolve.

[5] In view of our resolution of this issue, we conclude that, on retrial, Fed. R. Evid. 403 would not bar admission of noncumulative evidence of this proper element of damages. We also note that the issues on retrial have been reduced considerably by our resolution of the arguments raised on appeal.

IV.

THE ROBINSON-PATMAN CLAIM

La-Z-Boy originally manufactured one line of chairs, the Charter line, which was purchased primarily by furniture stores. Prior to the events at issue here, La-Z-Boy created a second line, the Americana line, which was developed for sale to department stores. The evidence at trial tended to prove that the differences between the two lines, if any, were at most cosmetic. Because department stores allegedly preferred to do their own advertising, La-Z-Boy established a promotional allowance which it offered on each Americana chair. The allowance ranged over time from $2.25 to $3.00 per chair. La-Z-Boy offered only advertising aids to the furniture stores retailing the Charter line. World of Sleep carried the Charter line and did not obtain an advertising allowance on most of the chairs it purchased. Montgomery Ward carried the Americana line and did receive the allowance.

World of Sleep claimed that La-Z-Boy violated section 2(e)[6] of the Robinson-Patman Act, 15 U.S.C. § 13(e), by failing to provide it the same allowance offered to Montgomery Ward. The jury returned a verdict for World of Sleep on the claim and awarded damages of $40,000. La-Z-Boy argues on appeal that this claim should not have gone to the jury because World of Sleep offered no evidence that it suffered actual injury as required to recover damages under section 4 of the Clayton Act, 15 U.S.C. § 15.

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[6] We note that World of Sleep's claim should properly have been asserted under section 2(d) rather than 2(e). World of Sleep claims that La-Z-Boy illegally gave an allowance to Montgomery Ward. "Section 2(d) applies when the *seller pays the buyer*, or grants him a price allowance, for promotional services to be rendered by the buyer; Section 2(e), on the other hand, applies when a *seller performs* the promotional service for the buyer." 5 J. von Kalinowski, Antitrust Laws and Trade Regulation § 34.01[2], at 34-10 to -11 (1984) (footnotes omitted). This error does not affect our analysis because these two sections have been interpreted almost identically. *Id.* 34.02.

To recover damages for a Robinson-Patman violation under section 4 of the Clayton Act, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). As we discuss above in Part III E, a plaintiff must show that he suffered actual antitrust injury as a result of the violation — he must prove injury in fact.

In *J. Truett Payne* the Supreme Court rejected the "automatic damages" rule with respect to section 2(a) violations,[7] and concluded that the requisite injury and damages cannot be presumed from a showing of illegal discrimination alone. 451 U.S. at 563. That holding is equally applicable to a plaintiff seeking damages for a violation of section 2(e) because such damages are also governed by section 4 of the Clayton Act, the damages provision construed in *J. Truett Payne*. Under the Supreme Court's analysis, a plaintiff must show more than that he failed to receive a promotion allowance. He must show that this disadvantage adversely affected his ability to compete with favored competitors, because this is the competitive injury the Robinson-Patman Act was intended to prevent. *See id.* at 563-64 & n.4. Such a showing may be made by proof that the illegal discrimination permitted a favored purchaser to lower its prices and thereby reduce a plaintiff's sales or profits. *Id.* at n.4. A disfavored buyer might also show that as a result of paying more for its goods than its competitors, it was less able to "advertise, make capital expenditures, and the like." *Id.*

The record in this case contains no evidence that World of Sleep's ability to compete with favored purchasers of La-Z-Boy chairs was in any way impeded by its failure to receive the advertising allowance. A World of Sleep official,

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[7] Section 2(a) of the Robinson-Patman Act provides in pertinent part it "shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . ." 15 U.S.C. § 13(a).

Ted Koch, testified that his company had a "dramatic success story" with La-Z-Boy chairs, rec., vol. XV, at 1459, and had "a very pleasurable experience with the La-Z-Boy line by having a dramatic surge in sales of a product that we heretofore had not carried." *Id.* at 1460. Indeed, the record indicates that World of Sleep became the second largest independent retailer of La-Z-Boy chairs in the country and came close to being the largest. Koch also agreed that World of Sleep's advertising was effective to draw customers. Hansen himself testified that World of Sleep's "advertising on La-Z-Boy was quite successful. We were advertising a lot and it was doing a good job for us." Rec., vol. XXII, at 2907. World of Sleep presented no evidence that the allowance enabled favored competitors to lower their prices and divert sales, or that it had to lower its prices to an unprofitable level in response to such low prices. There is no evidence that the higher price World of Sleep paid for La-Z-Boy chairs had any other adverse impact on its activity in the marketplace. Indeed, World of Sleep's position at trial was that, under its method of retailing, its ability to obtain a sufficient *volume* of merchandise was the critical factor in its competitive position.

Although World of Sleep presented evidence that it paid more for La-Z-Boy chairs than did competitors who received the advertising allowance, this showing is not enough to establish injury in fact under the analysis in *J. Truett Payne*. In view of the complete absence of record evidence that the alleged Robinson-Patman discrimination had any detrimental effect on World of Sleep's ability to do business, its damage claim for this violation should not have gone to the jury. We therefore must reverse the award of damages under the Robinson-Patman Act.

V.

THE STATE LAW CLAIM

La-Z-Boy counterclaimed for damages against World of Sleep under the Colorado Unfair Practices Act, alleging that World of Sleep unlawfully sold La-Z-Boy chairs below cost. The jury found in favor of World of Sleep. On appeal, La-Z-Boy contends that it should have been granted a new trial on this claim because the verdict was against the weight of the evidence. We disagree.

Colorado law prohibits a vendor from selling below cost, as defined by statute, unless such a sale is made in good faith to meet competition. Colo. Rev. Stat. §§ 6-2-105, 6-2-110 (1973). A person injured by an illegal sale below cost may recover three times the amount of actual damages sustained. *Id.* § 6-2-111.

Denial of a motion for new trial alleging insufficient evidence will not be reversed unless the moving party has "demonstrated that the verdict was clearly o. overwhelmingly against the weight of the evidence." *Prebble v. Brodrick*, 535 F.2d 605, 617 (10th Cir. 1976). In this case, World of Sleep presented evidence at trial adequate to support the jury verdict in its favor.

VI.

CONCLUSION

We need not consider in detail the remaining allegations of error. In view of our disposition of the Robinson-Patman claim, the award of attorneys fees to World of Sleep for the Robinson-Patman violation must be reversed. If an award of fees is appropriate after retrial, it should be made under the guidelines set out in *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983).[9] We share the district judge's dismay over the failure

[9] Although *Ramos* addresses an award of fees under 42 U.S.C. § 1988 (1982), the same standards govern an award of fees under the federal antitrust laws. *See Hensley v. Eckerhart*, 461 U.S. 424, 430 n.4 (1983).

of La-Z-Boy's counsel to abide by the court's rulings during trial; however, we need not determine whether such conduct was prejudicial and we presume it will not recur. We have examined World of Sleep's argument with respect to the jury instructions and conclude that, except for the court's failure to give a per se instruction as discussed in Part III C above, World of Sleep's allegations of reversible error are without merit.

Accordingly, we affirm the judgment for Mauldin and Montgomery Ward on the Sherman Act claim. We reverse the judgment for La-Z-Boy on this claim and remand for a new trial in light of this opinion. We reverse the judgment and award of damages and attorney fees in favor of World of Sleep on the Robinson-Patman claim. Finally, we affirm the judgment in favor of World of Sleep on the claim under the Colorado Unfair Practices Act.

Affirmed in part, reversed in part, and remanded for further proceedings.

Sherman Act, Section 1

SHERMAN ACT, SECTION 1

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1893

In The

Supreme Court of the United States

October Term, 1984

LA-Z-BOY CHAIR COMPANY,
Petitioner,

v.

WORLD OF SLEEP, INC.,
Respondent.

WORLD OF SLEEP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether vertically-imposed restrictions which do not entail agreement to a specific resale price or range of prices can be deemed per se violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

2. Whether resale price maintenance arrangements should continue to be judged under the per se rule.

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WORLD OF SLEEP, INC'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

For the Court's review, a detailed statement of the facts is contained in Respondent's Cross Petition, case number 85-64. Three of the tape recordings which contained several elements of the price fixing conspiracy are set forth in their entirety in the Appendix to the Cross Petition. Respondent's abbreviated Statement of the Case in this Response to the Petition contains the facts essential to decide if the per se rule was improperly applied because a specific price was not agreed to, or to determine whether the per se concept should now be reexamined to change the law relating to resale price maintenance.

The fact simply was that there was an agreement to keep prices up: "I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up, which is illegal to even talk to him about" (Tr. III, 342; Cross Pet. App. 39a). That agreement came about after World of Sleep ran advertising which compared its low prices to Montgomery Ward's and Mauldin's [La-Z-Boy Showcase Shoppe] higher prices (Ex. 198, 202). Separate but contemporaneous World of Sleep advertising had declared a "Price War on La-Z-Boys" (Ex. 273, 275, 286). A Montgomery Ward employee in Denver sent one of the comparison ads to Montgomery Ward's home office in Chicago (Tr. VII, 973) whereupon the National Chair Buyer for Montgomery Ward asked La-Z-Boy's National Marketing

Manager, "Can't you get the guy to stop [price comparisons]" (Tr. VI, 915). The La-Z-Boy representative said he would talk to the guy and then told Montgomery Ward that World of Sleep would stop (Tr. VI, 915). After a high level meeting with Montgomery Ward about the advertising (Tr. III, 362; Cross Pet. App. 55a), La-Z-Boy told World of Sleep "I presume that you know we have your company on a credit hold now, and—you know—we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's gonna happen, and we're very sorry that any of this is happening" (Tr. III, 362; Cross Pet. App. 55a-56a).

Montgomery Ward admitted it did not want to compete with World of Sleep, could not compete with World of Sleep without hurting its profits, and in fact did not lower its prices to meet World of Sleep's low prices (Tr. VII, 983). In a year and a half of head to head competition, World of Sleep had drastically cut into Montgomery Ward's market share of La-Z-Boy sales. Its 34 percent and 39 percent share of the market in the two years before World of Sleep had dropped to 25 percent by the end of 1975. World of Sleep had captured 54 percent of the market in its first full year of selling La-Z-Boys (Ex. 35c).

La-Z-Boy offered evidence that the credit hold and its continuation was because World of Sleep did not pay its invoices on time (Tr. XIII, 2307) and further credit restrictions were imposed even after the account was paid and ready for release because it took three months to clear up the initial problem (Tr. XIII, 2320-21). World of Sleep contended it did not pay the invoices because the chairs were shipped on the wrong dates (Tr. III, 370), a problem

La-Z-Boy admitted it had with its deliveries to all dealers (Tr. III, 372; VII, 1040).

La-Z-Boy did not contend the termination of World of Sleep had anything to do with World of Sleep's failure to follow a La-Z-Boy distribution plan, or that it was because World of Sleep failed to keep its prices up or because Montgomery Ward or La-Z-Boy wanted the price comparison advertising stopped.

Petitioner's Statement of the Case contains some questionable characterizations of the facts:

1. In the first paragraph of its Statement of the Case (p. 2) it is stated that "[t]he proofs . . . demonstrated . . . that the alleged conspiracy had no direct effect on retail prices of La-Z-Boy chairs". World of Sleep's tendered evidence, eventually rejected by the trial court because Mauldin was dismissed on summary judgment, was that Mauldin raised his prices after promising to keep his prices up (Ex. 141, 141A, 352; Tr. II, 160-62). Apart from that, La-Z-Boy's statement is proof that the conspiracy was successful: Montgomery Ward did not have to lower its prices to meet World of Sleep's prices and World of Sleep's low prices were eliminated when its supply of chairs ran out.

2. La-Z-Boy twice states that Montgomery Ward's complaint had nothing to do with pricing (second full paragraph page 3; end of first paragraph page 5). However, Gene Spilo, Montgomery Ward's Denver District Merchandiser, said: "[I]nstead of competing with World of Sleep, [I] took one of their ads and sent it to Chicago" (Tr. VII, 973). He said there wasn't anything particularly wrong with the ad, just that it referred to the point

that Montgomery Ward's price was $100 higher (Tr. VII, 975-6). Montgomery Ward's National Chair Buyer Weissenstein's description of the ad was, "[t]hey took a Ward's catalog page, blew it up in the newspaper and said, here is Ward's price, and here is our price" (Tr. VI, 913).

3. "There was no evidence of any objection by Montgomery Ward or Mauldin to this [price war] advertising which featured substantial price reductions" (first full paragraph, page 4). However, the tape recordings prove otherwise: Rall (following his call to Mauldin): "I got at least 47 people beating me on the head and alongside the head and one of them is kicking me in the ass and that's Montgomery Ward". Hansen: "What have I done?" Rall: "Well you ran a little ad the other day—World of Sleep declares price war on La-Z-Boy" (Tr. III, 342; Cross Pet. App. 38a).

4. La-Z-Boy characterizes Weissenstein's request to La-Z-Boy to stop the advertising as "simple" (second full paragraph, page 4). Respondent refers the Court to the tape recording of Rall on June 23rd (Ex. 3, Cross Pet. App. 55a) to demonstrate how much coercion Montgomery Ward put on La-Z-Boy, and see paragraph 5 following.

5. La-Z-Boy doubts the veracity of its former employee, Rall (first full paragraph, p. 7), who got caught red-handed trying to fix prices (the tape recordings, Cross Pet. App. 38a-65a). It tries to paint World of Sleep in agreement with that assessment by a comment Respondent's counsel made to the Court of Appeals that Rall lied to Montgomery Ward (botton of p. 7) when he told Weissenstein, after talking with Hansen, that Han-

sen would stop the price advertising. What Respondent said in its brief was, "Instead they [Montgomery Ward] 'asked' a $12,000,000 question, 'can't you get the guy to stop?'" According to Rall he wasn't just asked, he was called in for a "command performance" where he got "kicked in the ass" and "really took a beating over there". It is no wonder he lied to Montgomery Ward when he reported back, sir, he said he wouldn't do it" (Appellant's Opening Brief p. 28).

6. La-Z-Boy emphasizes that the credit hold of May 26, 1976 came about *prior to* the advertising that "criticized" Montgomery Ward (first paragraph, p. 8). Exhibit 202 is a Rocky Mountain News ad dated March 31, 1976, and identified by Montgomery Ward as having the same content as the one that was sent to Chicago (Tr. VII, 977). A similar ad had run again the date of the first call with Rall, June 16th (Cross Pet. App. 56a), and the one sent from Denver had, at least by the time of the June 23rd call, reached Vice President Lutz's office where it was pinned to the wall (Cross Pet. App. 55a).

REASONS WHY THE PETITION SHOULD BE DENIED

A. Petitioner's assertion that a per se violation of Section 1 of the Sherman Act is not made out because the resale price maintenance scheme did not include a reference to a specific price or a range of prices is contrary to established principles announced by this Court in *United States v. Trenton Potteries Co., United States v. Socony-Vacuum Oil Co.* and reaffirmed in *Arizona v. Maricopa County*

Medical Society. An agreement to "keep prices up" in response to a powerful retailer's invitation to the manufacturer to stop price comparison advertising by a competi tor is a retail price maintenance conspiracy condemned by the per se rule.

B. The continued applicability of the per se rule to resale price maintenance schemes may require reexamination in light of *Continental T.V., Inc. v. GTE Sylvania, Inc.* and *Monsanto Co. v. Spray-Rite Service Corp.* However, this case does not present facts where the restraint, a credit hold to interrupt supply, was utilized for a procompetitive reason or had any procompetitive effect. Even if the manufacturer now claims that its resale price maintenance scheme was procompetitive, the reason it advanced at trial for terminating the dealer was because he didn't pay his bills on time, not because he didn't keep his prices up. Therefore, the question presented in this case is whether the termination of the dealer was in furtherance of a dealer and manufacturer marketing strategy *to maintain prices* or simply to get rid of a dealer who allegedly posed a financial risk to the manufacturer. The manufacturer's asserted reason for the termination was not due to a "distributional restraint" of the kind which permits market impact comparisons between price and nonprice restrictions.

ARGUMENT

A. Per Se Analysis Is Appropriate Whether The Resale Price Maintenance Scheme Involves Setting A Specific Price Or Not

There is little appreciable difference between Petitioner's two reasons for seeking review. In argumnt 1 Peti-

tioner asserts that where an alleged vertical restriction does not entail agreement on a specific resale price or range of prices, the restriction should be submitted to the jury under the rule of reason (Petition, 12). As a corollary to argument 1, resale price maintenance which does involve a specific price or range of prices is a per se violation. It is curious that such a slight difference in a price fixing scheme should warrant application of two very different antitrust principles. Argument 2 proposes that the per se rule is inapplicable to all vertical resale price maintenance schemes. Both arguments urge the rule of reason analysis for the price fixing conspiracy in this case.

The fine line Petitioner draws between resale price maintenance which involves a specific price and resale price maintenance that does not involve a specific price does not exist, and never has, according to this Court. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982). Therefore, the real purpose of La-Z-Boy's petition is to ask for reexamination of the applicability of the per se rule to all resale price maintenance as was requested by the Department of Justice in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. —, 104 S. Ct. 1464 (1984), but not there considered.

The problem with using this case as a vehicle for reviewing the per se rule is that it does not fit the sometimes difficult analysis brought about by the similarities between some price and some nonprice restraints identified in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and noted again in *Monsanto*. This case does not present a factual situation where the restraint in question can arguably be said to have been imposed because of a

market stratagem in the nature of a nonprice restraint that had an effect on price.

The thrust of Petitioner's first argument is answered in its entirety by *Arizona v. Maricopa County Medical Society, supra,* a case omitted by Petitioner in its discussion of the point it tries to make. *Maricopa* is relegated to footnote treatment as merely an example of the continued applicability of the per se rule to price agreements between competitors (Petition, 14 n. 5). Although *Maricopa* involved a horizontal price conspiracy, it is not distinguishable as to whether price fixing, vertical or horizontal, requires a specific price.

Every circuit court decision cited by Petitioner on this point, save one,[1] was decided before the decision in *Maricopa. Maricopa* did not depart from established antitrust principles, but the time span between it and *United States v. Socony-Vacuum Oil Co., supra,* which it reaffirmed, had allowed some theories to develop which permitted vertical price fixing to be considered as coming from a different mold than horizontal price fixing. *Arizona v. Maricopa County Medical Society,* 457 U.S. at 348, n. 18.

> We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 84 L.Ed. 1129 60 S. Ct. 811: 'Under the Sherman Act a combination formed for the purpose and with the effect of raising,

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[1] *Maykuth v. Adolph Coors Co.,* 690 F.2d 689 (9th Cir.) was decided October 19, 1982 and did not refer to *Maricopa.* Although Coors' specific pricing schedule was involved, the dismissal of the price fixing count was affirmed because the dealer testified he did not follow the schedule and Coors never threatened reprisals if he didn't. Other evidence confirmed that dealers set their prices independently. The question of specific versus nonspecific pricing wasn't in issue.

> depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.' 340 U.S. at 213.

Arizona v. Maricopa County Medical Society, 457 U.S. at 346-47.

Does it follow that because *Maricopa* dealt with a specific price schedule that other price fixing arrangements not dealing with specific prices are not per se violations? In *Maricopa*, the practice questioned was the establishment of a schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed. The schedule could be revised upon vote of the entire membership of the society. This Court applied to that plan, "rules that are justified in their general application". 457 U.S. at 354. Petitioner's argument that the per se concept should not apply because neither minimum nor maximum specific prices were set would permit form to control over substance, and carefully conceived price schemes could escape per se condemnation. The inherent wrong of all price fixing schemes is the agreement to fix prices, not the price or level of prices set.

The language of *Socony-Vacuum; supra* and *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), repeated by this Court in *Maricopa*, 457 U.S. at 345, is too clear to permit the finite distinction that a specific price fixing arrangement warrants per se analysis, but non-specific price fixing does not.

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the Trenton Potteries Co. Case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sher-

> man Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used.

United States v. Socony-Vacuum Oil Co., 310 U.S. at 222.

In this case the exact words of one step in the price fixing consipracy were "I extracted a promise to keep prices up." "Up" meant pegged to Montgomery Ward's pricing, because that is what Montgomery Ward wanted when it "asked" La-Z-Boy, and La-Z-Boy agreed, to get World of Sleep to stop the advertising that compared World of Sleep's low prices to Montgomery Ward's high prices. Those facts, of course, do not present a carefully conceived scheme. The conspiracy was a rough product of purchasing power by a large buyer who played rough with its supplier. La-Z-Boy's Rall volunteered that he knew what he was doing was illegal when he got a promise from Mauldin. Inferentially, the knowledge of illegality was not limited to one phone call; it existed when he accepted Montgomery Ward's invitation to stop price advertising by World of Sleep, it existed when he called Hansen the first time to use the "illegal talk" on Hansen, and it existed when he left World of Sleep on credit hold until he could figure out what's gonna happen.

The Court of Appeals was correct when it reversed the trial court's refusal to give a per se instruction to govern the La-Z-Boy/Mauldin conspiracy. But it was wrong in not seeing the probative value of Montgomery Ward's "complaint" as an invitation to conspire, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and dismissed Montgomery Ward. There was shown by the totality of the circumstances[2] a "conscious commitment to a

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[2] See Respondent's Cross Petition, Sections I and II.

common scheme designed to achieve an unlawful objective" —elimination of price competition one way or another. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. at 1471.

B. Factors For Reexamination Of The Per Se Rule Are Not Presented: This Case Does Not Allow A Comparison Between Price Restraints And Nonprice Restraints. The Question Presented Below Was Whether A Dealer's Termination Was Due To Credit Problems Or Due To His Failure To Join A Conspiracy To Keep Prices Up.

At the outset of this argument Respondent notes that Petitioner La-Z-Boy did not argue for abandonment of the per se rule in the lower courts. It did mistakenly stress, as it does here, that this is a case involving a vertical nonprice restraint and therefore should be judged by the rule of reason in reliance on *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).[3] The suggestion for abandonment of the per se rule for resale price maintenance arises from the amicus position taken by the Department of Justice in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984). Indeed, Petitioner's major argument is a coattailing of the Solicitor General's brief in *Monsanto* (Petition, 26-28).

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[3] Petitioner's arguments before the Court of Appeals were:

A. Vertically Imposed Non-Price Restraints Must Be Judged Under the Rule of Reason

B. World of Sleep Did Not Establish Price Fixing Subject to a Per Se Rule

C. World of Sleep Failed to Establish Any Per Se Unlawful Horizontal Conspiracy

In trying to bring this case within the class of situations discussed in *Monsanto* where the danger that the doctrines of *Sylvania* and *Colgate* could be eroded, the Petitioner has failed, like other parties and courts, to make the two distinctions which this Court has emphasized are necessary for a proper analysis of antitrust doctrines: concerted versus independent action, and concerted action to set prices versus concerted action on nonprice restrictions. 104 S. Ct. at 1469.

It is neither hard to draw the suggested distinctions in this case nor difficult to apply the doctrines to the facts. This case does not present a nonprice restriction of the nature which, if viewed either closely or from a distance, can have the same effect on the market as a price restriction. This Court in *Monsanto,* as in *GTE Sylvania,* was talking about a "particular market strategy". Justice White, in his concurring opinion in *GTE Sylvania,* referred to "distributional restraints", 433 U.S. at 70, when identifying the class of restrictions being reviewed (customer restrictions in *GTE Sylvania* and territorial restrictions in *Schwinn*). The type of nonprice vertical restrictions which should be compared with price restrictions are those "[v]ertical restrictions [which] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products". *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 54 (1977).

World of Sleep was put on credit hold and then kept there without getting chairs, according to La-Z-Boy, for credit reasons. La-Z-Boy has not suggested that the reason behind its credit hold was to limit the number of sellers to reduce intraband competition in order to promote its

interbrand competition. Nor has La-Z-Boy suggested that its credit hold had anything to do with a market strategy to compete more effectively in the ways noted by the Supreme Court in *GTE Sylvania*. 433 U.S. at 55. Instead La-Z-Boy asserts its sole reason for the interruption of supply to World of Sleep was for nonpayment of invoices.

Thus, this case is only about the first distinction noted in *Monsanto*—concerted versus independent action. Concerted action to fix prices was proved: "can't you get the guy to stop", "I'll talk to him", "he said he would"; and "I got a promise to keep prices up". Was the "plan [to] leave you right there [credit hold] until we can figure out what's gor a happen" an attempt to coerce adherence to the price fixing arrangement to "keep prices up", or was it merely independent action by La-Z-Boy to keep one of its largest independent dealers from being a "bad business risk" because of a payment dispute over admittedly poor deliveries on La-Z-Boy's part?

This is not a case which requires drawing a distinction between concerted action to set prices and concerted action on nonprice restraints. The act which La-Z-Boy calls a nonprice restraint is the continuation of a credit hold which had nothing to do with a marketing plan. The "nonprice restraint" is nonexistent.

These are not "highly ambiguous" facts. This case permits an inference that the termination was pursuant to an agreement to maintain prices. *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. at 1472. The facts of this case are much stronger than those in *Monsanto* where the inference of conspiratorial termination was permitted on circumstantial evidence of an agreement on prices.

Market strategies which can be said to be procompetitive should be analyzed before the per se rule is applied to invalidate them. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50, n. 16 (1977).[4] The initial inquiry is to determine

> whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive'.

Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979).

Here, La-Z-Boy cannot even comfortably argue that its credit hold had a procompetitive effect, except to the extent that the credit hold on one independent dealer assured the continued financial viability of La-Z-Boy. However, the obvious market impact cannot be camouflaged by words: cutting off its second largest independent dealer not only eliminated that competition, it also was clearly against La-Z-Boy's economic interests.[5] It is not surprising that the evidence in this case bears out the factual premise of the statement in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 56, n. 24, "[G]enerally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, *because a lower re-*

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[4] Cited in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 80 L.Ed.2d 2, 26 (1984)

[5] La-Z-Boy states in its Petition at p. 29, "[t]here is no evidence that output was restricted". The exact opposite was proved: not only was World of Sleep deprived of its chair supply, the lack of its competition caused the entire Denver market to fall.

tail price means increased sales and higher manufacturer revenues". (Emphasis added). When World of Sleep entered the La-Z-Boy market in Denver, La-Z-Boy sales increased 72 percent.

If, however, La-Z-Boy is now taking the position that its *agreements* with Montgomery Ward and Mauldin were not a price restriction, but are nonprice restraints which have procompetitive aspects, or even if its argument is that the agreements were price restraints with procompetitive aspects,[6] a misunderstanding of the per se rule is obvious. In *Arizona v. Maricopa County Medical Society* 457 U.S. 332, 351 (1982), this Court noted:

> The respondent's principal argument is that the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

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[6] La-Z-Boy states on p. 28 " . . . La-Z-Boy's concerns and actions were entirely procompetitive in effect and purpose". There is no elucidation of the "actions". Montgomery Ward's attempt to mask its complaint about the advertising as "unethical" is, of course, mentioned in the Statement of the Case, pages 3 and 4. The statement "La-Z-Boy sought to have its dealers make enough money to stay in business and provide the ancillary services necessary for La-Z-Boy to compete effectively" is not supported by the Record. "Concerns" without accompanying actions are not actionable.

This happens to be one of those cases that presents, upon initial inquiry, a simple matter to determine whether the practice is the type of price fixing that the per se rule is meant to condemn on its face, without regard to the practice's purported justifications. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979). The facts in this case are unlike the blanket license in *Broadcast Music, Inc.* that required someone to set the price. La-Z-Boy's agreement to try to stop price advertising and to keep prices up, and failing that, to cut off World of Sleep's supply, restricted competition and decreased sales in the Denver market. The agreements were intended to be anti-competitive and they were; the defense of a credit hold had nothing to do with rendering markets more, rather than less, competitive.[7]

This case does not even present a factual situation which lends itself as an example of why resale price maintenance ought to be viewed differently than other price fixing agreements. The so-called procompetitive aspects of resale price maintainance usually come about when the price maintenance is initiated by the manufacturer.[8] The facts of this case show that it was a powerful retailer who sought the price control. That is not uncommon, nor was

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[7] The imposition of the credit hold in this case is not the same marketing practice that was condemned in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) where the elimination of credit terms once offered to all retailers was agreed to by a group of competing wholesalers.

[8] The elimination of the "free rider" is one justification. For a description of "free rider" and other economic goals for resale price maintenance see Marks and Jacobsen, *Price Fixing: An Overview*, The Antitrust Bulletin, Vol. XXX, No. 1, p. 36, n. 129.

the result unexpected that prices remained "up" and sales were down—such an effect is contrary to the market impact which the proponents for abondoning the per se rule for resale price maintenance suggest should be encouraged. Marks and Jacobson, *supra*, note 8 at 248.

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CONCLUSION

The guiding light of the Sherman Act is to preserve competition.[9] The long and arduous development of the per se and rule of reason concepts includes both the decisional process and the activity or lack of activity by Congress in the antitrust arena. Resale price maintenance has become a battleground for scholars who can foretell that some restraints imposed to benefit competitors may be necessary to achieve preservation of competition for the ultimate benefit of the consumer.[10] In balancing those apparently conflicting interests, this Court should carefully select cases for review which are likely to become keys in the evolution of antitrust doctrines. Cases selected should have facts which will permit decisions to be based on principle, not cases with "rare" facts.[11] World of Sleep submits that it is rare to capture the essence of

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9 *Northern Pacific R. Co. v. U.S.*, 356 U.S. 1, 4-5 (1958).

10 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

11 Respondent does not suggest preclusion of review of unique cases such as *Nat'l Collegiate Athletic Ass'n v. Board of Regents of U. of Okla.*, 104 S. Ct. 2948 (1984), which involved analysis of an industry requiring restraints on competition "if the product is to be available at all". 82 L.Ed.2d at 84. Retail sales of chairs is not an industry unto itself.

a price fixing agreement on tape. Although World of Sleep would like to correct the Tenth Circuit's failure to properly use those tapes, which led it to dismiss Montgomery Ward and Mauldin, a Supreme Court review of the particularized facts of this case would only serve to distinguish it from the core of antitrust cases where conspiracies, by their nature, must be proved on circumstantial evidence.

Respondent submits Petitioner's first question presented is a make work argument to reach the substantial question of abandoning the per se rule for resale price maintenance. This is not an appropriate case for reexamination of that rule because the case does not have facts which would permit drawing a new line to distinguish resale price maintenance from other price fixing conspiracies, if the Court were inclined to do so.

Respectfully submitted,

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